

A Trip to the Courthouse: Part 1

The United State Court of Appeals for the Ninth Circuit is a federal-looking building nestled in among the offices and shops and business parks of San Francisco's downtown. Large marble walls and staircases try desperately to send the message that what goes on here is of paramount importance, that the decisions made in these halls will reverberate throughout a large part of the country: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington — the largest of any appeals court.

But, this morning, the courtroom tells a different story. With people packed like Sardines into a room not much bigger than a bedroom in a San Francisco apartment, with one of the judges missing and replaced — without explanation — with a large television, and with hesitant, stammering public defenders arguing their cases against only slightly-less-hesitant civil servants, I briefly wondered if I was in the wrong room.

The first case I saw appeared to be a man requesting asylum in the US from his home country. I missed large portions of the case, but as I paid attention, the facts started coming out. He wanted asylum from persecution because he was gay. But the country he was hiding from didn't exactly have a record of persecution of gays. And the only evidence of persecution he could point to was that a couple people on the street once called him gay.

The next case seemed a little better for the non-government guy. It was about a man who accused of defrauding Medicare by double-billing. He noted that the Court had changed the law during the case; instead of just requiring the jury to find *whether* double-billing had occurred, it now required the jury to find how much. But they'd made that change after the trial, so he'd never had a chance to present any evidence on how much double-billing had occurred. His lawyer asked for a chance to hold a hearing to present the evidence.

"Do you have the evidence?" a judge asked. The lawyer responded that he didn't, because he was a public defender and needed to hire a professional accountant to look through the math, but couldn't afford to without a judge's permission, and the judge denied his request at the same time he denied the hearing on the subject. But, he explained, the government's accountant had admitted on the stand that there were mistakes in the math he presented, although he didn't know what impact they had. Couldn't he just get a trial to assess the math? The judges didn't seem to think so.

If the judges weren't going to give a victory on that case, they really weren't on the next one. A man who lived with his mom in Massachusetts was challenging the government's search of his storage locker in Arizona. His lawyer sparred with the judges for some time about the details of Fourth Amendment law. Then the government's lawyer took the stage. "Let me tell you about this man," he said. "As a condition of his parole, he wasn't permitted to have any guns. But he kept one gun, the machine gun he'd had since he was a kid — he called it his baby. The government got a tip and showed up on his doorstep and he practically handed them the gun and then told them to go away. It was raining outside and he wouldn't let them into his house. They searched the house and found another machine gun kit."

"In Court, he was asked if he had any more guns. His lawyer, acting on his client's behalf, insisted that the Court didn't have jurisdiction because all the other guns were in a storage locker in Arizona. After the lawyer said that, we had to search the locker in Arizona. There we found a huge shipping crate. To take the crate into evidence, the government had to inventory it. There we found 44 flamethrowers, 22 submachine guns, 5 hand grenades, and a handful of pistols. We had to call in the bomb squad and check over everything. And he's arguing that the Fourth Amendment doesn't permit us to open that crate."

Later, I heard some of the lawyers on a different case joking. "Once opposing counsel says flamethrowers, you've lost. Doesn't matter how good your case is. You're never going to recover from that."

It was into this environment that Larry Lessig stepped. Lessig has been thinking about the implications of copyright law for most of his career. He has spent months practicing to argue before the Supreme Court and other lesser courts. He spent the weekend practicing this case with other faculty members at the Stanford Law School. He spent the morning pacing the halls, going over his notes one last time. And as he strode into the Courtroom that morning and begun his argument before the Court, unlike every other lawyer who had presented, he didn't stumble over a single word.

In some ways, this should have been home territory for Lessig. It was his own Court, right in his own town of San Francisco. And as he paced the halls, he was continually interrupted by former students of his at Stanford Law, who had gone on to careers as lawyers in the area, which had brought them here, to argue before the Court just like him. And, perhaps he figured, the judges would welcome a break from the endless parade of petty complaints to his arguments about the big issues — the First Amendment, the Progress clause, copyright. Weren't things like that why they became judges in the first place?

Perhaps not.

[continued in part 2](#)

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